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August 18, 2004

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Secretary
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AUG 18 2004

Federal Communications Commission
Office of Secretary

Re: **Ex Parte Communication**

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996
CC Docket No. 96-128

Dear Ms. Dortch:

Nineteen months after the D.C. Circuit struck down the old payphone rules,[1] ten months after the Commission adopted new rules,[2] and more than a month after their effective date,[3] the American Public Communications Council ("APCC") still refuses to accept that first-switch interexchange carriers cannot and should not be made responsible to payphone owners for the obligations of other carriers. APCC's latest ex parte letter (August 04, 2004) continues to press for the indirect equivalent of the vacated rules, by which first-switch IXCs were directly liable to payphone service providers ("PSPs") for the obligations of switch-based resellers ("SBRs"). If entertained by the Commission, APCC's latest demand would likely lead Intermediate Carriers ("ICs") to terminate some or all of the arrangements they have made available to SBRs that wish to rely on ICs for payphone tracking, reporting, and compensation.

In its order adopting the new rules, the Commission returned responsibility for payphone compensation to the switch-based carrier that completes a coinless payphone call, recognizing that it is the "primary economic beneficiary" of that call and thus appropriately is directly responsible for compensating the PSP. Order at ¶¶ 28, 36. The new rules, however, also fully addressed PSPs' concerns about SBRs through a series of extensive -- and expensive -- audit, identification, and reporting requirements.[4]

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[1] Sprint v. FCC, 315 F.3d 369 (D.C. Cir. 2003).

[2] The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order, 18 FCC Rcd 25,756 (2003) ("Order"), adopting rules codified at 47 C.F.R. §§ 64.1300, et seq.

[3] 69 Fed. Reg. 26825-26 (May 14, 2004).

[4] These include certification of data (47 C.F.R. § 64.1310(a)(3)); audits of tracking, reporting, and payment systems (47 C.F.R. § 64.1320); filing of contact information (47 C.F.R. § 64.1320(g)); identification of upstream and downstream carriers (47 C.F.R. §§ 64.1310(a), (c)); detailed reporting on calls routed to switch-based resellers (47 C.F.R. § 64.1310(c)); and retention of verification data for at least 18 months (47 C.F.R. § 1310(g)). The Commission also signaled heightened enforcement and increased penalties. Order at ¶ 44.

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The Commission expected major carriers, including Sprint, to offer a payphone compensation service to SBRs, which those carriers could offer to PSPs as an alternative to their full compliance with these rules.[5] Under these arrangements, an SBR would contract with an intermediate carrier to track, report, and pay PSPs on its behalf, based on 100% of answer supervision on the IC's network. This option would appeal to SBRs who do not find it cost-effective to meet the vastly-increased burdens of the new payphone rules,[6] need more time to update their systems or to conduct their audits, and/or do not want to block payphone calls.

Where SBRs make such arrangements for their payphone compensation obligations, PSPs should be more than fully satisfied. Because it is impossible for any SBR to secure individual approval from all of the nation's approximately 5,500 PSPs, AT&T asked the Commission to confirm that PSPs' concurrence may be deemed, for obvious reasons.[7] First, PSPs will be substantially *overcompensated*, since they will be paid for the very large percentage of calls that are noncompleted and otherwise ineligible for compensation from the SBR. Second, PSPs will have all information they need to verify the payments received, since the payment for an SBR calls would match the IC's report of calls routed to that carrier. Third, if the PSP is not paid for the calls for any reason, it will have information with which to identify and pursue that SBR. Fourth, if these arrangements are not accepted, some of these SBRs may have little choice but to block calls from payphones, which can only reduce payphone usage further.

Yet even all of the benefits of these arrangements for PSPs -- and of the new rules' audit, reporting, identification, and record-keeping requirements -- still are not enough for APCC. It insists (at 1) "that the Commission's compensation *rule*" must be modified to return *to ICs* the SBR's "liability." It wants the right to pursue *intermediate carriers* directly *for the SBR's obligation*. It wants to shift its own costs of collection and bad debt, and the payphone compensation costs of SBRs, onto ICs, even though the Commission has just included recovery for both PSP collection costs and bad debt in the payphone compensation rate.[8] It persists at this despite the Commission's acknowledgements that the D.C. Circuit found that "Section 276 does not permit the Commission to lawfully 'require one company to bear another one's expenses'"[9] and "that the PSPs ha[ve] remedies to recover [SBR] debt from delinquent carriers."[10]

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[5] Order at ¶ 48 n.136

[6] APCC has also pushed aggressively for additional, costly, and unjustified requirements for carriers, such as tracking and reporting of noncompleted calls and call duration. It seeks to raise the costs and burdens of payphone compensation to such a level that only the largest carriers could hope to comply with them. Its objective is to compel an indirect return to the old, vacated rules, by forcing SBRs to contract with ICs.

[7] AT&T Petition for Clarification or, in the Alternative, Reconsideration (filed Dec. 8, 2003).

[8] Request to Update Default Compensation Rate for Dial-Around Calls from Payphones, FCC 04-182, WC Docket No. 03-225 (rel. Aug. 12, 2004) at ¶¶ 64-75.

[9] Order at ¶ 31 n.83, citing Illinois Pub. Telecoms. Ass'n v. FCC, 117 F.3d 555, 556 (D.C. Cir. 1997).

[10] Id. at ¶ 32, citing APCC v. FCC, 215 F.3d 51, 56 (D.C. Cir. 2000).

Intermediate Carriers like Sprint have no reason to want an SBR competitor to avoid its own payphone obligations. But neither do ICs have any incentive to participate in arrangements if those open the door to liability for another carrier's obligations, or to nuisance litigation by PSPs that time and again have distorted their purported "rights to compensation" (APCC at 3) beyond all reality.

APCC belittles the risk that intermediate carriers may decline to offer SBRs this service. It pretends (at 2) that AT&T somehow "has already agreed to the conditions proposed by APCC." In fact, Sprint understands that APCC seriously misrepresents AT&T's stated position by implying that it agreed to a rule change making ICs directly liable for SBRs. AT&T signaled its intention to pay for SBR traffic, *under its contract with the SBR*, until the termination of that SBR's payphone compensation service is effective. Nothing in the record, however, suggests that AT&T embraced a rule change shifting an SBR's direct liability for payment to PSPs if AT&T "voluntarily" contracts to act as a conduit for the SBR, or that AT&T's contracts with SBRs give PSPs a right to sue AT&T for the SBR's obligation. These are contractual arrangements between the IC and the SBR to process and pay payphone compensation on the SBR's behalf. The SBR remains responsible for payment to PSPs under the Commission's rules. AT&T, the Commission may recall, was among the ICs that successfully appealed the "first-switch pays" rule. MCI also has opposed APCC's position.[11]

Sprint is not alone in having reserved the right to terminate these arrangements with any or all SBRs if further burdens are imposed. At a time when many long distance operations are unprofitable, when wholesale margins are minimal, and when the payphone compensation rate is poised to more than *double*, APCC's conditions would likely compel ICs to either curtail or eliminate these offerings.

That result would benefit no one. The Commission should reject APCC's continued efforts to return the industry to rules the Commission has already properly rejected.

Respectfully submitted,

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[11] APCC points (at 2-3) to an obsolete August 19, 2003 MCI ex parte presentation and claims that it somehow accepted the concept of IC liability to PSPs for contracting SBRs. Actually, MCI had made only a tentative proposal -- floated before the new rules issued and not embraced by other ICs -- that at most mistakenly assumed that the Commission might retain the chief unlawful element of the vacated rules. In a July 29, 2004 ex parte letter, MCI expressly rejected APCC's argument that ICs should be directly responsible to PSPs for SBRs under these arrangements.